STATE OF MICHIGAN

COURT OF APPEALS

CHERYL CRUTE and CARL CRUTE,

Plaintiffs-Appellants,

v

MEIJER INC.,

Defendant-Appellee.

UNPUBLISHED
October 10, 2000

No. 214272
Wayne Circuit Court
LC No. 98-801421-NO

Before: Cavanagh, P.J., and Saad and Meter, JJ.

PER CURIAM.

In this premises liability case, plaintiffs appeal as of right from the circuit court order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). We affirm.

On appeal, an order granting or denying summary disposition is reviewed de novo. In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

Plaintiff Cheryl Crute tripped and fell on an empty display shelf, an "end cap," located in the center aisle of defendant's store. Plaintiffs contend that the display shelf was not an open and obvious danger or, alternatively, that defendant had a duty to protect Mrs. Crute from the end cap because it had reason to expect that Mrs. Crute's attention would be directed elsewhere.

A premises owner must maintain his or her property in a reasonably safe condition and has a duty to exercise due care to protect invitees[1] from conditions that might result in injury. *Riddle v*

[1] An invitee "is one who enters a premises to conduct business that concerns the premises owner at the owner's express or implied invitation." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 90, n 4; 485 NW2d 676 (1992). Defendant does not deny that Mrs. Crute was an invitee.

McLouth Steel Products Corp, 440 Mich 85, 90; 485 NW2d 676 (1992). A possessor of land has no duty to protect an invitee from dangers that are so obvious and apparent that an invitee can be expected to discover them herself. *Id*. at 94. A danger is open and obvious if it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995).

However, even if a danger is open and obvious, the landowner may still owe a duty to protect an invitee from it if special circumstances exist. As our Supreme Court explained in *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995):

> [T]he rule generated is that if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition or realized its danger. On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions. The issue then becomes the standard of care and is for the jury to decide. [Footnotes omitted.]

"'Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, ...'" *Id*. at 611-612, quoting 2 Restatement Torts, 2d, § 343A, comment f, p 220.

Viewing the evidence in a light most favorable to plaintiffs, we conclude that it does not establish a triable issue concerning defendant's breach of duty. Defendant did not have a duty to protect Mrs. Crute from tripping over the end cap because it was an open and obvious danger. Mrs. Crute testified that she would have noticed the end cap had she been looking at the floor. However, she was not able to look at the floor directly in front of her because she was carrying a stack of six towels. From the evidence, it is clear that the end cap created a risk of harm *only* because Mrs. Crute did not discover the condition, as her arms were full of merchandise that blocked her view of the floor. Although plaintiffs contend that, as viewed from directly above, the end cap would appear to be part of the floor due to its color and placement among the checkerboard-patterned tiles, this argument is not convincing. First, the evidence shows that Mrs. Crute approached the end cap from the side, a position from which, if she had been looking, she would have seen the end cap shelf and noticed it was elevated approximately two or three inches. Second, Mrs. Crute admitted that she would have seen the end cap had she been paying attention, which, admittedly, she was not. A party may not create an issue of material fact merely by contradicting her own deposition testimony. See *Schultz v Auto-Owners Ins Co*, 212 Mich App 199, 202; 536 NW2d 784 (1995). The trial court did not err in finding that the end cap was an open and obvious danger.

Finally, plaintiffs contend that defendant still owed a duty to protect Mrs. Crute from the end cap, although it was open and obvious, because it was foreseeable that Mrs. Crute's attention would be

diverted as she looked to the nearby checkout lanes to see which line was shortest. It is generally accepted that in a "self-service" type store like defendant's, in which merchandise is displayed on counters or on shelves so that customers can browse as they perambulate the aisles, a customer can presume that the owner will keep the passageways provided for her use in a reasonably safe condition, primarily because the storekeeper intends that its customers will devote a major part of their attention to the displayed merchandise, rather than to the floor to discover possible obstructions in the aisle. *Jaworski v Great Scott Supermarkets, Inc*, 403 Mich 689, 699-700; 272 NW2d 518 (1978). However, Mrs. Crute was not distracted intentionally by an enticing display of merchandise. Instead, she was distracted by the checkout lanes and her desire to purchase the towels as quickly as possible. Plaintiffs do not support their underlying premise, i.e., that defendant intended the checkout lanes to entice and distract its customers, or that the checkout lanes were intrinsically distracting. Under these circumstances, defendant did not have reason to expect that a customer in Mrs. Crute's position would have been so distracted as to have failed to take precautions for her own safety. Thus, defendant was not under any obligation to protect Mrs. Crute from tripping over the end cap, which was an open and obvious danger. The trial court properly granted summary disposition in defendant's favor.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Patrick M. Meter